

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HARRY LEELAND EMERY

Claimant

VS.

STATE OF KANSAS

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Fund

Docket Nos. **1,005,338 &
1,038,104**

ORDER

Respondent and its insurance fund requested review of the September 15, 2010 Order by Administrative Law Judge Kenneth J. Hursh. Both parties submitted briefs and the case was placed on the Board's summary docket on December 28, 2010, for decision without oral argument. The Division of Workers Compensation's Acting Director Seth Valerius appointed Thomas D. Arnhold of Hutchinson, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired in September 2010.

APPEARANCES

Joshua Perkins of Kansas City, Missouri appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The Board has considered the same record as the Administrative Law Judge (ALJ) which included a motion hearing transcript dated September 15, 2010, and the parties briefs.

ISSUES

Harry Emery had the two above captioned workers compensation claims pending against respondent when he died for reasons apparently unrelated to his alleged work injuries. Mr. Emery's widow, Lisa Emery, filed a motion to substitute her as administratrix of Mr. Emery's estate. Respondent filed a motion to dismiss both claims alleging the

motion to substitute was not made within a reasonable time pursuant to K.S.A. 60-225(a)(1).

After hearing the motions, the ALJ denied respondent's motion to dismiss and granted the motion to substitute the Estate of Harry Emery as the claimant in the cases.

Respondent requests review of whether the ALJ erred in not dismissing the claims because the motion to substitute a party was not timely made. Respondent argues that the nine-month delay in filing a substitution of parties is unreasonable and therefore the claims should be dismissed.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Harry Emery's attorney (Timothy Power) filed a motion to withdraw on March 18, 2010. In that motion counsel advised the ALJ and counsel for respondent that on or about October 11, 2009, Harry Emery died. Lisa Emery, claimant's wife, informed Mr. Power that she no longer wished for him to represent decedent Mr. Emery. A hearing was held on April 7, 2010, and the ALJ issued an Order allowing Mr. Powers to withdraw. Mr. Powers filed his attorney lien on April 7, 2010.

On July 23, 2010, Mr. Joshua Perkins filed an entry of appearance on behalf of the deceased claimant. Also, a Motion for Substitution of Party was filed by Mr. Perkins on behalf of Lisa G. Emery, surviving spouse of Mr. Emery.

On July 28, 2010, respondent's attorney, Bryce Benedict, filed his response to the motion for substitution of party with the ALJ. Also, Mr. Benedict filed a motion to dismiss both claims with prejudice. "If no motion for substitution of party is made within a reasonable time the matter may be dismissed pursuant to K.S.A. 60-225(a)(1). *Belk, supra*. A motion to substitute a party was not made until some nine months after the claimant's death, despite the claimant being represented by counsel."¹

Mr. Perkins filed claimant's response to respondent's motion to dismiss on August 4, 2010, arguing that Mrs. Emery filed her motion to substitute within a reasonable time

¹ Motion to Dismiss filed July 28, 2010.

period. A second motion for substitution of party was filed on August 4, 2010, wherein the Estate of Harry Emery was named as the proper party.

A motion hearing was held on September 15, 2010, and the ALJ issued his order denying dismissal of the claims and allowing the Estate of Harry Emery to be substituted as the appropriate party.

Respondent appealed and again argues the claims should be dismissed for failure to substitute parties within a reasonable time.

The Board must first determine whether it has jurisdiction to consider this appeal. The Board only has jurisdiction to review "[a]ll final orders, awards, modification of awards, or preliminary hearing awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge."² It should be noted that although the ALJ's Order refers to a preliminary hearing, the transcript of proceeding from the September 15, 2010 hearing notes the matter was a motion hearing. Moreover, the ALJ noted at the start of the hearing that "We're here for a hearing on a couple of motions in two cases involving Harry Emery and the State of Kansas."³ The Board finds that this appeal is not from an order entered pursuant to the preliminary hearing statute.⁴ Stated another way, the order denying respondent's motion to dismiss the cases does not relate to an award of temporary total disability or medical treatment and is not a preliminary award under K.S.A. 44-534a.

Accordingly, for the Board to have jurisdiction to review the subject order, the order must be a final order, award, or modification of an award. The Board must next determine whether respondent's motion to dismiss these claims and the ALJ's denial of that motion constitutes a final order.

The Board concludes that the ALJ's Order that denied respondent's motion to dismiss the claims is an interlocutory order made by the ALJ during the litigation of a workers compensation case. It is an order that the ALJ has authority to make during the trial process, and the Board lacks jurisdiction to review such an order until it is contained in a final order or award.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. The Kansas Court of Appeals, however, has recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The court stated three criteria which make

² See K.S.A. 44-551(b)(1).

³ M.H. Trans. at 3.

⁴ See K.S.A. 44-534a.

an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is not effectively reviewable on appeal from a final judgment.⁵

Respondent's motion to dismiss, having been denied by the ALJ, would not constitute a final order as it could be raised at a future time. However, had that motion to dismiss been granted, it would have been a final order under K.S.A. 44-551 and would have satisfied the three criteria set forth in *Skahan*. Because the denial of the motion to dismiss is an interlocutory decision and not a final decision, the appeal must be dismissed.

AWARD

WHEREFORE, it is the decision of the Board that respondent's appeal of the Order of Administrative Law Judge Kenneth J. Hursh dated September 15, 2010, should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this 28th day of February, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joshua P. Perkins, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Kenneth J. Hursh, Administrative Law Judge

⁵ *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).